

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

PACIFIC CENTER FOR CHILDREN )  
AND FAMILIES, T.B., D.L, L.L., )  
and T.O., )

Plaintiffs, )

vs. )

Civ. No. 07-6162

OPINION and ORDER

NORTH BEND SCHOOL DISTRICT; )  
OREGON DEPARTMENT OF EDUCATION; )  
OREGON DEPARTMENT OF HUMAN )  
SERVICES; SOUTHERN OREGON )  
ADOLESCENT STUDY AND TREATMENT )  
CENTER ("SOASTC"); B.J. )  
HOLLENSTEINER, Individually and )  
in her official capacity as )  
Superintendent, North Bend )  
School District; ROBERT )  
LIEBERMAN, Individually, and in )  
his official capacity as )  
Executive Director, SOASTC; )  
NANCY LATINI, Individually and )  
in her official capacity as )  
Assistant Superintendent, )  
Oregon Department of Education; )  
ROBERT E. NIKKEL, Individually )  
and in his Official Capacity as )  
Assistant Director, Department )  
of Human Services; and GINGER )  
SWAN, Individually and in her )  
official capacity as Director, )  
Coos County Mental Health, )

Defendants. )

Coffin, Magistrate Judge:

Before the court is plaintiffs' Substituted Motion for Injunctive Relief (#10) and defendants' (North Bend School District, B.J. Hollensteiner, Oregon Department of Education, Oregon Department of Human Services, Nancy Latini, Robert E.

1 Nikkel) Motions to Dismiss Amended Complaint and Substituted  
2 Motion for Injunctive Relief (#18, #38). For the following  
3 reasons, plaintiffs' motion is denied, and defendants' motions  
4 are granted. Moreover, because the court lacks jurisdiction over  
5 the claims brought against defendants Southern Oregon Adolescent  
6 Study and Treatment Center, its Executive Director, and Ginger  
7 Swan, Director of Coos County Mental Health, the court dismisses  
8 those claims sua sponte under Fed. R. Civ. Proc. 12(b)(1).

#### 9 Background

10 Plaintiffs are Pacific Center for Children and Families  
11 (PCCF), a nonprofit provider of psychiatric day treatment for  
12 children, and four children who receive or have received PCCF's  
13 services. Defendant North Bend School District (NBSD) seeks to  
14 terminate its contract with PCCF to provide mental health day  
15 treatment services to certain of its students. Plaintiffs seek an  
16 injunction requiring NBSD and its Superintendent to provide  
17 education services for child plaintiffs in treatment at PCCF. In  
18 plaintiffs' view, by ceasing to place students at PCCF, NBSD  
19 violates Individuals with Disabilities Education Act (IDEA), 20  
20 U.S.C. § 1400 et seq.

21 Plaintiffs' concerns stem from the position that PCCF  
22 provides the least restrictive educational environment for child  
23 plaintiffs within the meaning of the IDEA, and the alternative  
24 service provider, Southern Oregon Adolescent Study and Treatment  
25 Center (SOASTC), may take actions that would deny plaintiff  
26 children the mental health and educational services for which  
27 they qualify. In plaintiffs' view, NBSD failed to provide  
28 appropriate resources to individual plaintiffs at their

1        respective assigned educational placements, and child plaintiffs  
2        should be educated and receive psychiatric treatment at PCCF  
3        rather than at school locations within the district. Plaintiffs  
4        further assert that NBSD's actions violate the Rehabilitation  
5        Act, 29 U.S.C. § 794, their due process rights, and constitute  
6        retaliation under state and federal law.

7        Plaintiffs also seek to injunctive relief against Oregon  
8        Department of Human Services Addiction and Mental Health Division  
9        (AMH) and the Assistant Director of DHS. Plaintiffs ask the  
10       court to order the agency to ensure that PCCF is granted an  
11       "unencumbered" license to continue its status as a certified  
12       provider of mental health services. Plaintiffs further request  
13       the court to order Oregon Department of Education and its  
14       Assistant Superintendent to name PCCF as the provider of services  
15       under the state's long term care and treatment contract, which  
16       governs provision of educational services for children placed in  
17       day treatment by the Oregon Department of Human Services.  
18       Plaintiffs assert that the actions of the state agencies and  
19       agents violate IDEA and the Rehabilitation Act, and they also  
20       bring due process claims against the individual state defendants.

21       Finally, plaintiffs seek to enjoin SOASTC, which NBSD seeks  
22       to hire to provide mental health treatment to certain students,  
23       and its director from taking any action counter to child  
24       plaintiffs' state and federal rights as recipients of publicly  
25       funded mental health and special education services. Plaintiffs  
26       apparently assert, with little factual basis, that SOASTC and its  
27       Director violate IDEA, the Rehabilitation Act, and their due  
28       process rights.

### Analysis

#### IDEA and Rehabilitation Act Claims

Fed. R. Civ. Proc. 12(b)(1), which requires dismissal of a claim for lack of subject matter jurisdiction, resolves defendants' motions to dismiss in their favor with respect to IDEA and Rehabilitation Act Claims. Neither the individual child plaintiffs nor PCCF bring justiciable claims. One child, D.H., has been voluntarily dismissed since the filing of this action. The attorneys agree that two of the four remaining child plaintiffs, D.L. and L.L., have been placed in residential treatment programs and are therefore no longer subject to actions by NBSD. Because those claims have been rendered moot, the court may not consider them. See United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).").

The remaining plaintiffs have failed to exhaust their administrative remedies, a prerequisite to obtaining relief in federal district court under IDEA. Robb v. Bethel School Dist. #403, 308 F.3d 1047 (9th Cir. 2002). The other two child plaintiffs, T.B. and T.O., have not brought any administrative challenge to their individualized educational programs. Nor has PCCF adequately pursued its concerns about cessation of placements in an administrative forum. At most, the record reveals that plaintiffs have variously e-mailed or corresponded by letter with NBSD or state agencies about dissatisfaction with NBSD's decision to discontinue PCCF's services as a treatment provider. As counsel for NBSD correctly explains, none of the

1 documents initiate due process proceedings under the IDEA, nor do  
2 they request a hearing under the state or federal Administrative  
3 Procedure Acts. The single administrative complaint adduced in  
4 the record, which was brought on behalf of PCCF, was met with an  
5 invitation for information from the state of Oregon. PCCF failed  
6 to respond. There is simply no demonstration that plaintiffs  
7 have complied with the exhaustion requirement. If plaintiffs  
8 were to challenge their educational programs before an ALJ,  
9 including challenges at issue here -- lack of qualified staff at  
10 placement locations outside of PCCF, adequacy of individualized  
11 education plans, and placement of students with disabilities --  
12 the ALJ would determine, on a case-by-case basis, the type of  
13 appropriate relief after developing and considering each  
14 plaintiff's discrete record. If the plaintiffs were still  
15 aggrieved, they would then be eligible to seek review in district  
16 court, and the court would be authorized (and equipped) to  
17 entertain the claims.

18 Moreover, plaintiffs have not demonstrated that an exception  
19 to the exhaustion requirement applies. Plaintiffs have asserted  
20 that exhaustion would be futile, relying on Kerr Center Parents'  
21 Ass'n v. Roach, 897 F.2d 1463 (9th Cir. 1990), but their argument  
22 is unavailing. The exhaustion requirement was deemed futile in  
23 Kerr in part because the school district in that case had refused  
24 to provide any services required under IDEA to children with  
25 disabilities and failed to engage in any due process proceeding  
26 concerning the students' educational needs. Kerr Center, 897  
27 F.2d at 1470. Here, by contrast, educational services have been  
28 made available to students, and due process rights are

1 safeguarded by state rule, which would provide for administrative  
2 hearings if activated. See Ashland School Dist., 47 IDELR 82,  
3 107 LRP 6612 at 1 (SEA Or Jan 2, 2007) (describing hearings  
4 procedure).

5 Subsequent authority in the Ninth Circuit holds that the  
6 exhaustion requirement obtains where the ALJ can provide some  
7 degree of meaningful relief, despite whether plaintiff might  
8 prefer a type of relief ultimately only available upon review by  
9 a district court. Robb, 308 F.3d at 1048. In this case, an ALJ  
10 would be well equipped to determine whether child plaintiffs are  
11 being educated in the least restrictive environment at their  
12 current placements. See Ashland School Dist., 47 IDELR 82. If  
13 not, the ALJ's decision would form the basis for a reassignment,  
14 which would constitute meaningful relief under Robb. If  
15 plaintiffs disagreed, the parties might then request relief in  
16 the district court, including the type of injunctive relief that  
17 they have prematurely sought. In sum, until a challenge is  
18 brought to an ALJ and a contested case hearing is conducted on a  
19 developed record, this court lacks the authority (not to mention  
20 the indispensable information) that is required to hear any of  
21 plaintiffs' IDEA claims.

22 By operation of statute, the IDEA exhaustion requirement is  
23 also a prerequisite to any claim under the Rehabilitation Act.  
24 IDEA states, in part:

25 "Nothing in this chapter shall be construed to  
26 restrict or limit the rights, procedures, and  
27 remedies available under the Constitution ...  
28 title V of the Rehabilitation Act of 1973, or  
other Federal laws protecting the rights of  
children with disabilities, except that before  
the filing of a civil action under such laws

1       seeking relief that is also available under this  
2       subchapter, the procedures under ... this  
3       section shall be exhausted to the same extent as  
4       would be required had the action been brought  
5       under this subchapter." 20 U.S.C. § 1415(1).

6       Thus, until plaintiffs have exhausted their administrative  
7       remedies under IDEA, their Rehabilitation Act claims will also  
8       remain unjusticiable.

9       PCCF further contends that AMH contravened the  
10      Rehabilitation Act by threatening to revoke PCCF's state license  
11      to provide mental health services. Again, PCCF fails to state a  
12      justiciable claim. PCCF is currently licensed. AMH has been  
13      investigating PCCF's compliance with licensing requirements and  
14      has requested information from PCCF in furtherance of that  
15      investigation. See Ex. A to State's Response to Motion for  
16      Injunctive Relief. The state has taken no action to revoke  
17      PCCF's license. PCCF contends that it has stopped receiving  
18      client placements due to the perception among placing agencies  
19      that its license is in jeopardy,<sup>1</sup> but PCCF adduces no evidence  
20      that it has been harmed on that basis. Because there is no ripe  
21      controversy under the Rehabilitation Act, and because PCCF has  
22      failed to demonstrate that it has suffered injury due to the  
23      actions of AMH, its license-based Rehabilitation Act claim

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24      <sup>1</sup>Apparently in order to cure the problem, PCCF asks the court to  
25      order ODE to name PCCF as the treatment provider in ODE's long term  
26      care and treatment contract, which governs provision of educational  
27      services for children placed in day treatment by the Oregon Department  
28      of Human Services. Plaintiff seems to suggest that ODE's failure to  
29      do so forms part of the basis of a cause of action against it under  
30      IDEA and the Rehabilitation Act. Because development of an  
31      administrative record is a predicate to considering matters that are,  
32      in turn, dispositive of the ODE defendants' liability (if any) under  
33      the law, the court lacks jurisdiction to determine claims against ODE  
34      and its Assistant Superintendent.

1 against AMH is unjusticiable.<sup>2</sup>

2 Finally, plaintiffs have raised the same unexhausted IDEA  
3 and Rehabilitation Act claims against SOASTC and its Executive  
4 Director, and they assert that the Director Of Coos County Mental  
5 Health, Ginger Swan, has violated the Rehabilitation Act.  
6 Plaintiffs seek an order from the court enjoining those  
7 defendants from taking action that would deprive plaintiffs of  
8 their statutory guarantees to educational and mental health  
9 resources, but they provide no factual allegation that would  
10 support the contention that any such injury has occurred. Doing  
11 so would depend on facts developed for each plaintiff using  
12 administrative procedures available under state law. Because  
13 plaintiffs have not stated justiciable claims against SOASTC, its  
14 Executive Director, or Ginger Swan, this court lacks jurisdiction  
15 over the matter and dismisses the claims on that basis.

#### 16 Due Process Claims

17 Plaintiffs further assert that the individual state  
18 defendants, NBSD and its superintendent, SOASTC and its Executive  
19 Director, and Swan violated their due process rights. Plaintiffs  
20 allege that the suspension of placements to PCCF results in  
21 deprivation of benefits and undenominated "state and federal  
22 constitutional and/or statutory rights," resulting in a violation  
23 of the right to due process under the Fourteenth Amendment.

24 Again, plaintiffs fail to state a justiciable claim.  
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27 <sup>2</sup> Even if PCCF could demonstrate injury, any intervention by this  
28 court into the state's ongoing licensing procedures would run afoul of  
the doctrine of Younger abstention. See Younger v. Harris, 402 U.S. 37  
(1971).

1 Regarding NBSD and its superintendent, plaintiffs' due process  
2 claims, made actionable through 42 U.S.C. § 1983, are subject to  
3 the IDEA exhaustion requirement of 20 U.S.C. § 1415(1), the same  
4 statute that imposes the exhaustion requirement for  
5 Rehabilitation Act claims. See 20 U.S.C. § 1415(1) ("before the  
6 filing of a civil action under [federal] laws seeking relief that  
7 is also available under this subchapter, the procedures under  
8 .... this section shall be exhausted to the same extent as would  
9 be required had the action been brought under this subchapter");  
10 Babicz v. School Bd. of Broward County, 135 F.3d 1420 (11th Cir.  
11 1998) (dismissing civil rights claim under § 1983 where  
12 plaintiffs had not exhausted remedies under related IDEA and  
13 Rehabilitation Act claims). Regarding state defendants, the  
14 allegations, if taken as true, lack any indication that  
15 plaintiffs were denied any other procedural right or other  
16 benefit that the State of Oregon owes to them. Finally,  
17 plaintiffs have not demonstrated how, if at all, SOASTC and its  
18 officials are public authorities that owe procedural or  
19 substantive rights to plaintiffs.

#### 20 Retaliation Claims

21 Plaintiff brings claims against NBSD and its Superintendent  
22 for violation of unspecified "[f]ederal and state laws [that]  
23 prohibit retaliation for advocating rights guaranteed at law[.]"  
24 To the extent that the retaliation claim is based in the federal  
25 IDEA or Rehabilitation Act, it is subject to the exhaustion  
26 requirement of 20 U.S.C. § 1415(1). As explained above,  
27 plaintiffs have failed to meet this requirement, and they offer  
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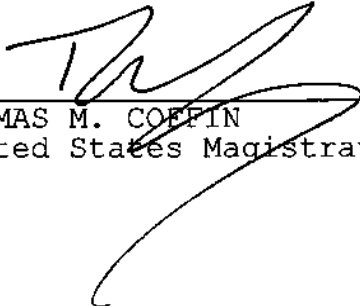
1 no basis on which the court may excuse it. In view of the  
2 absence of any live federal claims in this action, retaining  
3 supplemental jurisdiction over any retaliation claim based on  
4 unspecified state law is not appropriate, and I dismiss it for  
5 that reason. See 28 U.S.C. § 1367(c)(3) (a district court may  
6 decline to exercise supplemental jurisdiction where "the district  
7 court has dismissed all claims over which it has original  
8 jurisdiction").

9 Conclusion

10 Plaintiffs' Motion for Substituted Injunctive Relief (#10)  
11 is denied. Defendants' Motions to Dismiss Amended Complaint and  
12 Substituted Motion for Injunctive Relief (#18, #38) are granted.  
13 Because the court lacks jurisdiction over the claims brought  
14 against defendants Southern Oregon Adolescent Study and Treatment  
15 Center, its Executive Director, and Ginger Swan, Director of Coos  
16 County Mental Health, the court dismisses those claims sua sponte  
17 under FRCP 12b(1). This action is dismissed.

18  
19 IT IS SO ORDERED.

20 Dated this 19 day of September, 2007.

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25 THOMAS M. COFFIN  
26 United States Magistrate Judge  
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